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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

McGREW PAINT AND ASPHALT CO.,
Petitioner,

No. 756. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

RAILWAY PAINT CO.,
Petitioner,

No. 757. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

DEDNOX, INC.,
Petitioner,

No. 758. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

INSUL-MASTIC ROOFING & SIDING CO.,
Petitioner,

No. 759. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

WRITS OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

THE DARNELL-TORRENCE PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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WRITS OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

The respondent for this, his answer to the petition for writs of certiorari in the premises, says that, for the reasons and upon the considerations suggested in the brief accompanying this answer, the said petition for writs of certiorari should be denied.

FRANCIS B. MURPHY,
Director of Labor.
By: GEORGE F. BARRETT,
Attorney General of the State of Illinois.

STATEMENT OF THE CASE.

The Illinois Unemployment Compensation Act sets up a comprehensive plan for providing unemployment benefits for workers employed within the State by employers designated by the Act. These employers include all who employ six or more workers within twenty or more weeks in the year (eight or more workers prior to 1940), except those engaged in certain specified employments.

The Act imposes on employers who come within its scope the obligation to pay a certain percentage of their pay rolls into the State unemployment trust fund. Benefits are payable from the fund to the employees covered by the Act, in the event of their unemployment, upon prescribed conditions and at prescribed rates.

In order to prevent evasion of the law by dividing a business having the required number of workers to bring it within the statute into smaller units, each having less than the minimum number of workers (R. 33), the Illinois Legislature originally in 1937 incorporated into the Unemployment Compensation Act the provision which is now being attacked by the petitioners. This provision, more commonly referred to as the "affiliation provision," is as follows:

> "'Employer' means:
>
> "Any employing unit which, together with one or more other employing units, is owned or controlled, directly or indirectly, by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;" (Ch. 48, Par. 218(e)(4), P. 1610, Ill. Rev. Stat. 1937.)

The above section was amended on May 24, 1939 to read as follows:

> "'Employer' means:
>
> "Any employing unit which, together with one or more other employing units, is owned or controlled, directly or indirectly, by legally enforceable means or otherwise, by the same interests, or which owns or controls one or more other employing units directly or indirectly, by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing units or interests or both, would be an employer under paragraph (1) of this subsection." (Ch. 48, Par. 218(e)(5), P. 1614, Ill. Rev. Stat. 1939.)

The necessity for the above provision has been recognized not only in Illinois but also in many other parts of the country. Twenty-two other States now have a similar provision in their unemployment compensation laws.[1] Eight States have no need of an affiliation provision, since their unemployment compensation laws impose liability on employers with a minimum of one worker or very few workers.[2] Three States formerly contained an affiliation provision in their unemployment compensation acts but deleted it when their laws were amended so as to practically include all employers regardless of the number of their workers.[3]

The question sought to be presented.

The question raised by petitioners herein is whether the above affiliation provision in the Illinois Unemployment Compensation Act infringes the due process and equal protection clauses of the Fourteenth Amendment.

1. Arizona, Delaware, Florida, Georgia, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas and West Virginia.

2. Arkansas, California, Montana, Nevada, Ohio, Oregon, Pennsylvania and Wyoming.

3. Idaho, Utah and Washington.

ARGUMENT.

I.

Certiorari should be denied since no substantial Federal question is involved.

The question raised by petitioners has already been foreclosed by prior decisions of this Court so as to leave no room for real controversy.

In *Mississippi Unemp. Comp. Comm.* v. *Avent*, 192 Miss. 85, 4 S. (2) 296, 684, it was contended that certain provisions of the Mississippi Unemployment Compensation Act **identical with the provisions of the Illinois Unemployment Compensation Act herein attacked**, deprived the appellee of property without due process of law and denied him the equal protection of the law contrary to the State and Federal constitutions. The Supreme Court of Mississippi held that such provisions were not violative of either the State or Federal constitutions.

An appeal was taken to this Court, which dismissed the appeal **for want of a substantial Federal question.** *Avent* v. *Mississippi Unemp. Comp. Comm.*, 316 U. S. 641; 62 S. Ct. 947. In dismissing the appeal, this Court cited the following cases: *Carmichael* v. *Southern Coal Company*, 301 U. S. 495, 510-513; *Great A. & P. Company* v. *Grosjean*, 301 U. S. 412; *H. E. Butt Grocery Company* v. *Sheppard*, 311 U. S. 608; *Helvering* v. *Clifford*, 309 U. S. 331.

Carmichael v *Southern Coal Company*, *supra*, involved the general constitutionality of the Alabama Unemployment Compensation Act. The said Act at that time contained the following provision:

"* * * Where a person, partnership, associa-

tion, corporation, whether domestic or foreign, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, either directly or through a holding company or otherwise has a majority control or ownership of otherwise separate business enterprises employing persons in the state, all such enterprises shall be treated as a single 'employer' for the purposes of this act. * * *" (The Unemployment Compensation Act, Ala. Acts 1935, Sec. 2(f), P. 952; Ala. Code of 1928, 1936 Cum. Supp., Par. 7597.)

This Court, while not specifically discussing such provision, held that the Alabama Unemployment Compensation Act, as a whole, was not subject to any constitutional infirmity.

In *Great A. & P. Company* v. *Grosjean, supra*, this Court upheld the constitutionality of a State chain store tax act which provided that the tax "shall be based on the number of stores or mercantile establishments included under the same general management, supervision or control."

The *Butt Grocery* case, *supra*, involved an appeal from the decision of the Court of Civil Appeals, 3d Supreme Judicial District of Texas, which sustained the validity of the Texas Chain Store Act. *H. E. Butt Grocery Company* v. *Sheppard*, 137 S. W. (2d) 823, 824. The said statute provided that the "Act shall be construed to apply to every person [or] * * * corporation * * * which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management. * * *"

In its decision, the Texas Court pointed out that the law was manifestly intended to prevent large chains of stores from circumventing the tax burdens imposed under the Act, by organizing separate corporations to operate them,

the capital stock of which, or a majority of it, being owned by a parent corporation or holding company, or by an individual or association of individuals. The Court also noted that it was immaterial that the appellant corporations were organized and were operating stores separately before the Act was passed.

Upon appeal to this Court, the case was dismissed for want of a substantial federal question, the Court citing *Great A. & P. Company* v. *Grosjean, supra; Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Liggett Co.* v. *Lee*, 288 U. S. 517; *Fox* v. *Standard Oil Co.*, 294 U. S. 87. The last three cases dealt with statutes similar to the one quoted above in *Great A. & P. Company* v. *Grosjean, supra.*

In *Helvering* v. *Clifford, supra*, this Court held that a husband was properly taxed for income of property placed by him in trust for his wife, where he retained control over the trust property and the income.

Upon consideration of the authorities cited by this Court in dismissing the appeal in the *Arent* case, *supra*, it is manifest that this Court by virtue of such decisions has upheld the validity of the provision herein attacked. Although petitioners have raised a federal question, it "is one which has been so explicitly decided by this Court as to foreclose further argument on the subject and hence to cause the federal question relied upon to be devoid of any substantial foundation or merit." (*Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314.)

It should be noted that language similar to the statute in question has for many years occurred in Federal Revenue Acts and has been the subject of frequent construction and explication in the opinions of Federal courts in many decisions.

For example, Section 240(b) of the Federal Internal

Revenue Act of 1918, which required affiliated corporations to file consolidated returns, defined affiliation, declaring it to exist where "substantially all of the stock of two or more corporations is owned or controlled by the same interests." U. S. Stat. at Large, Vol. 40, P. 1082.) This section was reenacted in the Revenue Acts of 1919 and 1921. It was changed to "owned by the same interests" in the Revenue Act of 1924.

The said provisions in the Federal Revenue Acts have been given effect in the following cases: *Pokorny Realty Company* v. *U. S.*, 59 Fed. (2d) 236; *American Auto Trimming Co.* v. *Luca*, 37 Fed. (2d) 801; *Uniform Printing & Supply Company* v. *Comm.*, 33 Fed. (2d) 445 (C. C. A., 7th); *Comm.* v. *City Button Works*, 49 Fed. (2d) 705, 706; *Palmgrove Company* v. *Comm'r*, 25 Fed. (2d) 801; *Lavenstein Corporation* v. *Comm'r*, 25 Fed. (2d) 375; *J. Rogers Flannery & Company* v. *Comm.*, 42 Fed. (2d) 11; *Olds and Whipple* v. *Comm.*, 75 Fed. (2d) 272 (C. C. A., 2d, 1925); *Black Diamond Coal Co.* v. *Comm.*, 61 Fed. (2d) 573 (C. C. A., 7th, 1932); *Island Petroleum Co.* v. *Comm.*, 57 Fed. (2d) 992 (C. C. A., 4th); *Burnet Comm'r* v. *Wilshire Oil Co., Inc.*, 46 Fed. (2d) 975 (C. C. A., 9th, 1931); *Kile & Morgan Company* v. *Commissioner*, 41 Fed. (2d) 925.

The case of *Independant Gasoline Company* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58, upon which petitioners rely, represents a minority view and stands alone. It is ably discussed and disapproved of in *Washington* v. *Kitsap County Bank*, 10 Wash. (2d) 520, 117 P. (2d) 228.

As against the holding in *Independent Gasoline Company* v. *Bureau of Unemp. Comp., supra*, affiliation provisions in the unemployment compensation laws of twelve other States which are similar to the one in question have been sustained as constitutional in the following cases:

New Haven Metal and Heating Supply Co. v. *Danaher*, 128 Conn. 213, 21 A. (2d) 383; *Mt. Vernon Bank and Trust Co.* v. *Iowa Employment Security Comm.*, 11 N. W. (2d) 402; *Maine Unemp. Comp. Comm.* v. *Androscoggin, Jr., Inc.*, 137 Me. 154, 16 A. (2d) 252; *Maryland Unemp. Comp. Bd.* v. *Albrecht*, 36 A. (2d) 666; *Godsol* v. *Michigan Unemp. Comp. Comm.*, 302 Mich. 652, 5 N. W. (2d) 519; *Mississippi Unemp. Comp. Comm.* v. *Avent*, 192 Miss. 85, 4 S. (2d) 296, 684; *Kellogg* v. *Murphy*, 349 Mo. 1165, 164 S. W. (2d) 285; *Wiley Motors, Inc.* v. *Unemp. Comp. Comm.*, 130 N. J. L. 30, 31 A. (2d) 39; 131 N. J. L. 228, 35 A. (2d) 894; *Unemp. Comp. Comm.* v. *Willis*, 219 N. C. 709, 15 S. E. (2d) 4; *Gibson Products Co.* v. *Murphy*, 186 Okla. 714, 100 P. (2d) 453; *Witherspoon Oil Co.* v. *State* (Texas), 156 S. W. (2d) 579; *Washington* v. *Kitsap County Bank*, 10 Wash. (2d) 520; 117 P. (2d) 228.

It is respectfully submitted that the question raised by petitioners is clearly unsubstantial and that the petition for writs of certiorari should therefore be denied.

II.

The denial of certiorari in Bureau of Unemp. Comp. v. Independent Gasoline Company, 311 U. S. 707, relied upon by petitioners, imports no expression of opinion upon the merits of that case.

Petitioners' assert that provisions similar to the one in question have been held unconstitutional in *Independent Gasoline Company* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58 and in *Benner-Coryell Lumber Company* v. *Indiana Unemp. Comp. Board*, 218 Ind. 20, 29 N. E. (2d) 776, and that this Court has denied certiorari in both of these cases. *Bureau of Unemp. Comp.* v. *Independent Gasoline Company*, 311 U. S. 707; *Indiana Un-*

emp. Comp. Board v. *Benner-Coryell Lumber Company*, 312 U. S. 698.

A careful reading of the decision of the Supreme Court of Indiana in *Benner-Coryell Lumber Company* v. *Indiana Unemp. Comp. Board*, *supra*, clearly indicates that the statute therein attacked was *not declared* unconstitutional but that it was held inapplicable to the facts in that case. Moreover, this Court denied certiorari in the foregoing Indiana case **for want of a final judgment.** *Indiana Unemp. Comp. Board* v. *Benner-Coryell Lumber Company*, *supra.*

The denial of certiorari by this Court in *Bureau of Unemp. Comp.* v. *Independent Gasoline Company*, *supra*, imports no expression of opinion upon the merits of the case. That rule has been stated many times by this Court. *U. S.* v. *Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Company* v. *Wolf Brothers & Company*, 240 U. S. 251, 258; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403, 404.

It should be noted that in *Bureau of Unemp. Comp.* v. *Independent Gasoline Company*, *supra*, the Supreme Court of Georgia held that the provision in question violated both the state and federal constitutions. Its decision as to the validity of the statute under the state constitution is accepted as binding by this Court. *Minnesota* v. *National Tea Company*, 309 U. S. 551, 556; *Alton R. Co.* v. *Illinois Commission*, 305 U. S. 548, 554; *Senn* v. *Tile Layers Union*, 301 U. S. 468, 477.

A decision by a state court holding a state statute invalid because repugnant to like provisions in both the federal and state constitutions rests upon adequate non-federal grounds and will not be reviewed by this Court. *Lynch* v. *New York*, 293 U. S. 52. Where an independent and adequate non-federal ground of decision appears, review may not be had in the Supreme Court of the United

States, even though the state court purports to decide a federal question and decides it erroneously. As this Court has pointed out, in such a case reversal for error in the decision of the federal question would be "useless and profitless," for the state court could thereafter enter the same judgment upon the non-federal ground alone. *Murdock* v. *Memphis*, 20 Wall. 590, 634, 635; *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 165.

In view of the foregoing, the reason for the denial of certiorari by this Court in *Bureau of Unemp. Comp.* v. *Independent Gasoline Company, supra*, is clear. It is respectfully submitted that such denial imports no expression of opinion upon the merits of that case.

III.

Petitioners' contention that the affiliation provision in question covers control by illegal means is devoid of merit.

Petitioners maintain that the phrase "by legally enforceable means or otherwise" as contained in the affiliation provision purports to include control by unlawful and fraudulent means. The contention is inapplicable and frivolous as is evident from the following:

First, prior to May 24, 1939, the affiliation provision in the Illinois Unemployment Compensation Act did not contain the phrase "by legally enforceable means or otherwise." (Page 2 herein.) Such phrase was added by amendment on May 24, 1939 (Page 3 herein).

The petitioners were in existence prior to that date (Petitioners' Brief P. 20) and their liability was predicated upon the provisions of the statute prior to the said amendment.

Second, the argument is based on purely gratuitous assumptions. It is without any foundation in the record and is premised upon a complete misunderstanding of the opinion rendered by the Supreme Court of Illinois in the instant case.

The Illinois Supreme Court held that both ownership *and* actual joint control were necessary to bring an employer within the scope of the affiliation provision (R. 33, 34; see also *Moriarity, Inc.* v. *Murphy*, 387 Ill. 119, 55 N. E. (2d) 281, decided by the Supreme Court of Illinois on the same day as the instant case). It found that O. V. McGrew's majority ownership of the stock in each of the petitioner corporations constituted ownership within the meaning of the statute and that the stipulation as to control was a binding stipulation of fact made for the purpose of obviating the necessity of taking proof on the question of actual joint control, evidencing a unification in the management and formation of the policies of each of the petitioner corporations. It is difficult to conceive of control being other than legally enforceable under the above circumstances.

Third, petitioners place an unreasonable construction on the phrase "by legally enforceable means or otherwise." Such language plainly does not sanction control by unlawful or fraudulent means. The objective of the statute does not require such a construction nor will the Court impute such an intention to the Legislature. No court which has passed upon the affiliation provision has so construed it, least of all the Supreme Court of Illinois. On the contrary, the latter has limited the application of the affiliation provision to cases where both ownership *and* control are present.

It is submitted that petitioners' contention is without merit in this regard.

CONCLUSION.

For the foregoing reasons respondent submits that the petition for writs of certiorari should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.
Address: Supreme Court Building,
Springfield, Illinois.